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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, AND SCHENLEY DISTRIBUTORS, INC.,
Appellants,
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

No. 253

BEN BURK, INC.,
Appellant,
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, AND SEAGRAM DISTILLERS CORPORATION,
Appellants,
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

No. 255

HINRICHS DISTILLED PRODUCTS,
Appellant,
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

No. 256

ARROW DISTILLERIES, INC.,
Appellant,
vs.
ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT AS TO JURISDICTION.

JOSEPH M. HARTFIELD,
JAMES P. AYLWARD,
THOMAS KIERNAN,
GEORGE V. AYLWARD,
TERENCE M. O'BRIEN,
RALPH M. RUSSELL,
Counsel for Appellants.

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No. 256

ARROW DISTILLERIES, INC.,

Appellant,

vs.

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

APPLICANTS' STATEMENT, DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE IN QUESTION.

(Filed in United States District Court on June 4, 1938.)

Pursuant to Rule Twelve (12), Paragraph One (1), of the Supreme Court of the United States, effective July 1, 1936,

applicants file this their statement, showing the basis on which the applicants contend the Supreme Court of the United States has appellate jurisdiction to review the decree appealed from herein, which, omitting caption and signatures, is as follows:

"These causes having come on for hearing as a consolidated cause, pursuant to stipulation of the parties that said causes should be consolidated for all purposes including hearing, consideration, decision, determination and review, on January 10, 1938, before the Honorable J. W. Woodrough, United States Circuit Judge, the Honorable Merrill E. Otis, District Judge of the Western District of Missouri, Central Division, and the Honorable John C. Collet, District Judge for the State of Missouri, sitting in said Western District of Missouri, Central Division, sitting as a three-judge District Court, duly convened pursuant to the provisions of Section 266, as amended, of the United States Judicial Code, on the several petitions of plaintiffs praying for a temporary and permanent injunction against the defendants from enforcing the provisions of an act of the Legislature of Missouri, contained at pages 536 to 543, both inclusive, of the Laws of Missouri, 1938, being an act entitled "An Act prohibiting licensees from transporting or importing into this state, purchasing, receiving, possessing and selling intoxicating liquor and non-intoxicating beer manufactured or bottled in any state, the laws, rules or regulations of which discriminate against intoxicating liquor or non-intoxicating beer manufactured in this state or against those selling or dealing therein, defining discriminatory laws and prescribing the duties of the Attorney General with respect to determining the existence of the discriminations and providing for an appeal from his findings; prescribing the duties of the Supervisor of Liquor Control with respect to the enforcement of this act and providing for the revocation of licenses for a violation of this act, and defendants' motions to dismiss said petitions, and the causes having been duly heard and submitted as a con-

solidated cause before said three-judge court on said motions to dismiss said petitions and the argument of counsel thereon, and on the stipulations of the respective parties that said several causes should be taken as submitted, and finally heard and determined, and final decree entered therein, upon the pleadings as aforesaid, and the Court being now fully advised in the premises, it is

Ordered, Adjudged and Decreed, That said Act of the Legislature of Missouri, contained on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, heretofore in this decree particularly designated, does not violate the provisions of the Commerce Clause of the Constitution of the United States contained in Section 8, Article I thereof, or the Equal Protection Clause of said Constitution contained in Section 1 of the Fourteenth Amendment thereto.

It is Further Ordered, Adjudged and Decreed that the temporary restraining orders heretofore issued in the several constituent causes be, and the same hereby are, dissolved.

It is Further Ordered, Adjudged and Decreed that the applications for a temporary injunction and for a permanent injunction in each of the constituent causes be, and the same hereby are, denied.

It is Further Ordered, Adjudged and Decreed that the defendants' motions to dismiss the petitions in each of said constituent causes for want of equity be and the same are hereby sustained, and that plaintiffs' petitions in each of said constituent causes be and the same are hereby dismissed.

It is Further Ordered, Adjudged and Decreed that the costs incurred herein in each of said constituent causes be, and the same are, hereby adjudged against the respective plaintiffs therein.

It is Further Ordered, That this decree be filed and entered in the above entitled cause No. 668 in equity, and that conformed copies hereof be filed in each of the above-styled causes in equity Nos. 669, 670, 671 and 672."

I.

(a) The statute believed to sustain the appellate jurisdiction of the Supreme Court of the United States is the *Act of Congress of June* 18, 1910, *C.* 309, *Sec.* 17, 36 *Stat.* 557; *March* 3, 1911, *C.* 231, *Sec.* 266, 36 *Stat.* 1162; *March* 4, 1913, *C.* 160, 37 *Stat.* 1013; *February* 13, 1925, *C.* 229, *Sec.* 1, 43 *Stat.* 936-938 (28 *U. S. C. A., Sec.* 380).

(b) The statute of the State of Missouri, the validity of which is involved herein, is an *Act of the Fifty-ninth General Assembly of the State of Missouri, approved April* 8, 1937 (*Laws of Missouri,* 1937, *page* 536) known as the "*Anti-Discriminatory Liquor Law.*" Pertinent provisions of the Missouri Anti-Discrimination Act are as follows:

> "Section 4. The transportation or importation into this state, or the purchase, sale, receipt or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined. * * *"

(c) The following causes:

In Equity No. 668, JOSEPH S. FINCH & COMPANY, a corporation, Pennsylvania, THE OLD QUAKER COMPANY, a corporation, Maryland, and SCHENLEY DISTRIBUTORS, INC., a corporation, Delaware, Plaintiffs, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 669, BEN BURK, INC., a corporation, Massachusetts, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 670, JOSEPH E. SEAGRAM & SONS, INCORPORATED, an Indiana Corporation, and SEAGRAM DISTILLERS CORPORATION, a Delaware Corporation, Plaintiffs, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 671, HINRICHS DISTILLED PRODUCTS, a corporation, Missouri, Plaintiff, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

In Equity No. 672, ARROW DISTILLERIES, INC., a corporation, Michigan, Plaintiff, versus ROY MCKITTRICK, Attorney General of the State of Missouri, and THOMAS F. FITZGERALD, Supervisor of Liquor Control of the State of Missouri, Defendants;

were by stipulation consolidated for all purposes, including hearing, consideration, decision, determination and review. It was also stipulated at the same time the court heard and determined the application for an interlocutory injunction, it also finally heard and determined these causes and entered its final decree.

(d) Written notice was duly given, more than five (5) days before said causes were heard, to the Honorable Lloyd C. Stark, Governor of the State of Missouri, and to the Honorable Roy McKittrick, Attorney General of the State of Missouri.

(e) The decree appealed from was entered on the 16th day of March, A. D. 1938, and the application for appeal is presented on this 3rd day of June, A. D. 1938.

Plaintiffs, by their bill in equity, sought to enjoin the defendants from enforcing said act, alleging that said Anti-Discrimination Act is in violation of the Constitution of the

United States and, therefore, invalid and void upon the following grounds:

(1) That it violates *Section 8 of Article I of the Constitution of the United States* (*"Commerce Clause"*);

(2) That it violates *Section 10 of Article I of the Constitution of the United States* (*impairing obligation of contracts*);

(3) That it violates *Section 2 of Article IV of the Constitution of the United States* (*"Privileges and Immunities Clause"*);

(4) That it violates the *XIV Amendment to the Constitution of the United States* (*"Due Process Clause"*);

(5) That it violates the *XIV Amendment to the Constitution of the United States* (*"Equal Protection Clause"*).

The bill of the plaintiffs was pending before the Honorable J. C. Collet, District Judge, in the District Court of the United States for the Western District of Missouri, Central Division, who, upon motion properly filed, determined that the pleadings drew into question the constitutionality of the Missouri Statute above referred to, and that an interlocutory and permanent injunction was being sought upon the ground that such statute was repugnant to the Constitution of the United States. Judge Collet thereupon immediately requested the Senior Circuit Judge of the Circuit Court in which the District Court was located, to designate two (2) other judges to participate in hearing and determining the application for an injunction.

The Senior Circuit Judge designated the Honorable Joseph W. Woodrough, Circuit Judge, and the Honorable Merrill E. Otis, District Judge, to sit with Judge Collet, and empaneled the three-judge court to hear and determine the application for the injunction. The cause proceeded to hearing and determination before the three-judge court and

on the 16th day of March, A. D. 1938, a decree sustaining defendants' motion to dismiss and dismissing the bill and denying the injunction, was entered. The opinion sustained the validity of the Missouri Act assailed.

It is the contention of the applicants that the Constitutional questions involved are substantial. The question of the constitutionality of the challenged act was properly before the three-judge court for determination:

Spielman Motor Co. v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322;

Ex parte Bank of New York, 278 U. S. 101, 73 L. Ed. 202;

Ex parte Poresky, 290 U. S. 30, 78 L. Ed. 152;

In re Buder, 271 U. S. 461, 70 L. Ed. 1036.

The three-judge court having been legally assembled under the *Act of June* 18, 1910, *March* 3, 1911, *March* 4, 1913 *and February* 13, 1925, *supra*, properly assumed jurisdiction of all the questions involved, and under the plain provisions of the act, the appeal is direct to this Court:

Corporation Commission v. *Cary*, 296 U. S. 452, 80 L. Ed. 324;

Ex parte Collins, 277 U. S. 565, 72 L. Ed. 990;

Oklahoma Gas v. *Oklahoma Packing Co.*, 292 U. S. 386, 78 L. Ed. 1318;

Stratton v. *St. Louis Ry. Co.*, 282 U. S. 10, 75 L. Ed. 135;

P. S. Com. v. *Wisc. Tel. Co.*, 289 U. S. 67, 77 L. Ed. 1036;

Lawrence v. *Rwy.*, 274 U. S. 588, 71 L. Ed. 1319;

In re Buder, 271 U. S. 461, 70 L. Ed. 1036.

It is claimed by applicants that the District Court erred in denying the injunction, in the following particulars:

(1) The court erred in holding that the *Missouri Anti-Discrimination Act*, which provides in part as follows:

> "SECTION 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession

> herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined. * * *."

and which is contained in and appears on *pages* 536 *to* 543, *both inclusive, of the Laws of Missouri,* 1937, does not violate the provisions of *"The Commerce Clause" of the Constitution of the United States, contained in Section* 8, *Article I thereof,* which provides as follows: "The Congress shall have the power * * * to regulate commerce * * * among the several states * * *", because it discriminates against and excludes the importation of intoxicating and non-intoxicating alcoholic liquors produced in the States of Indiana, Pennsylvania, Massachusetts and Michigan, whether sold in competition or not with other liquors, and otherwise unduly burdens and unlawfully restrains and interferes with interstate commerce.

(2) The court erred in holding that the *Missouri Anti-Discrimination Act* does not violate the provisions of *Section* 10, *Article I of the Constitution of the United States,* which provides as follows: "No state shall * * * pass any *ex post facto* law or law impairing the obligation of contracts * * *", for the reason that said act impairs obligations under existing contracts of plaintiffs within the State of Missouri.

(3) The court erred in holding that the *Missouri Anti-Discrimination Act* does not violate the provisions of *Section* 2 *of Article IV of the Constitution of the United States,* which provides as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states", because said act denies to plaintiffs the privileges and immunities of citizens in the several States,

viz., in States other than Indiana, Pennsylvania, Massachusetts and Michigan.

(4) The court erred in holding that the *Missouri Anti-Discrimination Act*, contained in and appearing on *pages 536 to 543, both inclusive, of the Laws of Missouri*, 1937, does not violate the provisions of the *"Due Process Clause" of the Constitution of the United States, contained in Section 1 of the XIV Amendment thereto*, which provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law", because the *Missouri Anti-Discrimination Act* violates the *"Due Process Clause"* and, if enforced, will confiscate property of plaintiffs within the State of Missouri without due process of law.

(5) The court erred in holding that the *Missouri Anti-Discrimination Act*, contained in and appearing on *pages 536 to 543, both inclusive, of the Laws of Missouri*, 1937, does not violate the provisions of the *"Equal Protection Clause" of the Constitution of the United States*, contained in *Section 1 of the XIV Amendment thereto*, which provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws", because the unreasonable and arbitrary classifications and restrictions imposed upon some importers of intoxicating liquors which are not imposed upon others similarly situated are not permitted by the XXI Amendment, but are violative of the *"Due Process Clause"*.

(6) The court abused its discretion and erred in denying the interlocutory injunction.

(7) The court erred in dissolving the temporary restraining order heretofore issued herein.

(8) The court erred in denying the application for temporary and permanent injunction.

(9) The court erred in sustaining defendants' motion to dismiss plaintiffs' petition for want of equity.

(10) The court erred in dismissing plaintiffs' petition.

(11) The court erred in rendering a decree in conflict with opinions of another three-judge court in the same circuit (Eighth Circuit) on the same subject-matter, and particularly in conflict with the following cases decided by a three-judge court of the Eighth Circuit: *Triner* v. *Arundel*, 11 Fed. Supp. 145, (D. C. Minn.); *Triner* v. *Mahoney*, 20 Fed. Supp. 1019 (D. C. Minn.), which held that in the absence of a decision of the Supreme Court of the United States holding that a State may, by virtue of the XXI Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquors which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the XIV Amendment, the court would not declare a Minnesota Statute similar to the Missouri Act valid.

(12) The court erred in deciding an important question of general law in an untenable manner and in conflict with the weight of authority.

The applicants append hereto copies of all opinions delivered in this cause.

Respectfully submitted.

JOSEPH M. HARTFIELD,
THOMAS KIERNAN,
JAMES P. AYLWARD,
GEORGE V. AYLWARD,
TERENCE M. O'BRIEN,
RALPH M. RUSSELL,
Solicitors for Plaintiffs.

EXHIBIT "A."

Memorandum Opinion.

(Filed in the U. S. District Court on Feb. 23, 1938.)

Before Woodrough, Circuit Judge, Otis and Collet, District Judges.

OTIS, *District Judge*, delivered the opinion of the Court:

Following the adoption of the Twenty-first Amendment to the Constitution may Missouri prohibit the sale within the state of intoxicating liquors manufactured in such other states as have laws discriminating against intoxicating liquors manufactured in other states (including Missouri)? More specifically, if Michigan has a law imposing a tax upon the importation of intoxicating liquors from Missouri and other States, which tax (or a tax similar in amount) Michigan manufacturers of intoxicating liquors are not required to pay, may Missouri lawfully prohibit the sale in Missouri of intoxicating liquors manufactured in Michigan? Such questions are presented by these cases. Missouri has such a statute. Laws of Missouri, 1937, 536. Section 4 of that statute provides:

> "The transportation or importation into this state, or the purchase, sale, receipt or possession herein by any licensee of any alcoholic liquor manufactured in any 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The phrase, "state in which discrimination exists", is defined in the statute as we indicated in the first two sentences of this paragraph. The plaintiff (or plaintiffs) in each of the five cases is (or are) incorporated and manufacturing intoxicating liquors in a "state in which discrimination exists". The plaintiffs contend that the Missouri statute is invalid in that it violates (a) the "commerce clause" of the

Constitution (Art. I, Sec. 9, Par. 8) and (b) the "equal protection clause" of the Fourteenth Amendment. They ask that the enforcement of the statute be enjoined.

The "Commerce Clause" and the Twenty-first Amendment.

1. We would have thought that the first of the two contentions had in it much of merit were it not for the opinion and judgment of the Supreme Court in *State Board* v. *Young's Market Co.*, 229 U. S. 59, decided December 9, 1936. That case involved the validity of a California statute imposing a license fee for importing beer. It was the opinion of the Court that while before the adoption of the Twenty-first Amendment that such a statute clearly would have been invalid ("because the fee would be a direct burden on interstate commerce" and because "the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide"), the effect of Section 2* of the Amendment was to abrogate "the right to import free, so far as concerns intoxicating liquors" and to confer upon each state "the power to forbid all importations (of intoxicating liquors) which do not comply with the conditions which it prescribes." By reason of this opinion it must now be said that the implied prohibition upon state legislation arising from the "commerce clause" no longer exists, in so far as intoxicating liquors are concerned. So far as that one commodity is concerned the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution.

The "Equal Protection" Clause of the Fourteenth Amendment.

2. The opinion and judgment in *State Board* v. *Young's Market Co.* do not, however, dispose of the second contention made by plaintiffs. It was indeed contended in that case that the challenged California statute violated the "equal protection" clause. The classification of that stat-

* Section 2 of the Twenty-First Amendment provides that—

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

ute was: *importers* of beer and *manufacturers of beer within the state*. The statute discriminated against the first class in favor of the second class (although that discrimination perhaps was counterbalanced). The Court said: "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." But the classification which is "recognized by the Twenty-First Amendment" is one based on a distinction between intoxicating liquors manufactured *within* and *without* a state. It does not authorize a distinction between intoxicating liquors all of which are manufactured in other states. The classification made by the Missouri statute must stand or fall as may be required by the general principles developed for the enforcement of the Fourteenth Amendment.

The provision of the Fourteenth Amendment reading—"No state * * * shall deny to any person within its jurisdiction the equal protection of the laws", was most illuminated by the Supreme Court when long ago (1886) it said that the provision guaranteed to all persons "the protection of equal laws". *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369. The laws of a state must apply equally to all persons in the same or a similar situation. These principles are elementary. Equally elementary is it that a state "when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects." *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 560. What are the principles by which the propriety of a classification is to be determined?

These principles again and again have been stated by the Supreme Court. * * * (Legislation) which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." *Barbier* v. *Connolly,* 113 U. S. 27, 32. "The Fourteenth Amendment * * * does not prohibit legislation which is limited * * * in the objects to which it is directed * * *. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions * * *." *Hayes* v. *Missouri,* 120 U. S. 68, 71. "(Classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which

the classification is proposed, and can never be made arbitrarily and without any such basis * * * it (must be) one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification * * *." *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 155, quoted in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560. "* * * (It) is obvious that the legislature is the only judge of the policy of a proposed discrimination. * * * When a state legislature has declared that * * * policy requires a certain measure, its action should not be disturbed by the courts * * * unless they can see clearly that there is no fair reason for the law that would not require with legal force its extension to others whom it leaves untouched." *Missouri, Kansas and Texas Railway Company* v. *May*, 194 U. S. 267, 269.

"* * * (A) state may classify with reference to the evil to be prevented, and * * * if the class discriminated against is or reasonably might be considered to define those from whom the evil is to be feared, it properly may be picked out * * *." *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144. (The case upheld a statute forbidding unnaturalized foreign born persons owning shotguns.) "It must be * * * said that reasonable classification implies action consistent with the legitimate interests of the state * * * these cannot be so broadly conceived as to bring them into hostility to exclusive federal power." *Truax* v. *Raich*, 239 U. S. 33, 42. (The case involved an Arizona statute limiting employment of aliens lawfully within the United States.) "Classification" * * * must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand." *Ibid.* "* * * (Classification) must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; * * * classification cannot be arbitrarily made without any substantial basis." *Truax* v. *Corrigan*, 257 U. S. 312, 337. * * *. (The) mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be purely arbi-

trary, oppressive or capricious. But the mere production of inequality is not enough. * * * The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" *Radici* v. *New York*, 264 U. S. 292, 296. "(The Amendment) does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." *Power Mfg. Co.* v. *Sanders*, 274 U. S. 490, 493. "It never has been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. * * * the nearest approach to a definite rule * * * is that while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." *Bayside Fish Flour Co.* v. *Gentry et al.*, 297 U. S. 422, 427.

Mr. Justice Sutherland's summary of the precedents in the case last cited undoubtedly is the best statement of a test we have. It is not "infallible", it is not "all-inclusive", but it fairly epitomizes what the Supreme Court has said since it first recognized many years ago the doctrine of classification in applications of the equal protection clause. With this test in mind and a challenged statute to be tested we might well proceed after the manner now indicated. Let it be determined: (1) what object the state seeks to accomplish by the challenged statute? (2) Does the statute place persons in two or more classes and apply differently to the different classes? (3) Can it reasonably be argued that the object of the statute will be promoted by a recognition of the differences between the classes and the different application of the statute to the several classes? If question 3 is answered in the affirmative, then, of course, the classification is not "arbitrary or capricious" and the equal protection clause is not violated. The statute may be invalid for some other reason but not because it conflicts with the Fourteenth Amendment.

What object does Missouri seek to accomplish by the challenged statute. Learned counsel for plaintiffs in their brief say that the statute was enacted "by reason of certain so-called discriminatory features in the laws of those states (Indiana, Pennsylvania, Massachusetts and Michigan) which the Legislature of Missouri believed to be harmful, not to the people as a whole, but to the brewers of Missouri who may desire to ship their products into Indiana, Pennsylvania, Massachusetts and Michigan." In his reply brief the Attorney General says: The object was "by all legitimate means at its (*i. e.*, the State's) command, to obtain a repeal of the hostile legislation (*i. e.*, hostile to Missouri manufacturers of intoxicating liquors) in the states which had adopted protective tariffs (license-fees upon importation of intoxicating liquors from Missouri and other states), and this method (*i. e.*, the challenged statute) was chosen by Missouri when, in 1937, faced by a rising tide of discriminatory legislation in other states, its General Assembly enacted the Anti-discrimination Act." Counsel for the parties are right. Obviously the object of this statute was to promote the interests of Missouri brewers and distillers, engaged in an important industry. The statute tends to accomplish that object in two ways: (a) by shutting off some competition from the Missouri field; (b) by offering an inducement to other states to withdraw barriers to the products of this Missouri industry sought to be imported into those states. It would be idle to deny that such is the object of the statute and such the means by which the object is sought to be accomplished.

It would be idle to deny that the object aimed at by this statute is one proper to be sought after by the state. Of course Missouri may legislate to promote the interests of any Missouri industry. *Barbier* v. *Connolly*, 113 U. S. 27, 31. The welfare of the people depends upon the success of the industries of the state. By promoting the interests of first one industry and then another the state protects and advances the welfare of all the people. One piece of legislation will be designed to benefit those engaged in agriculture, another to benefit those engaged in mining, another to benefit those engaged in manufacturing. Nor is the benefit of

any single piece of legislation confined to those who first receive it. What benefits the brewers, for example, benefits also those who labor in the breweries, benefits the farmers whose grains the brewers purchase, benefits the merchants patronized by those more directly benefited. Men reasonably might argue that what benefits any one great industry in a state benefits the whole people.

The question remains: May it be contended with any reason that this proper object of legislation will be promoted by the classification of this statute? But the question is not difficult. Who will deny that at least it can be argued with a show of reason that the Missouri statute will tend to induce Indiana, and Pennsylvania and Massachusetts and Michigan to remove the barrier they have put up to shut out the products of the Missouri brewers and distillers (as well as like products from other states)? The Missouri statute discriminates between the manufacturers of intoxicating liquors in Indiana and those, for example, in Georgia, but for no merely arbitrary or capricious reason (as the color of their hair or the fact that the name of one state begins with the letter "I" and the name of the other begins with the letter "G"). The Missouri statute discriminates against Indiana manufacturers in favor of those in Georgia because Indiana discriminates against Missouri manufacturers and Georgia does not. The discrimination is certainly bottomed on reason, not a price. It is bottomed on the same reason as supports those national laws which effectuate the raising and lowering of our tariffs against goods imported from foreign countries as they raise and lower their tariffs against American manufactured goods.

Conceding that the classification made in a statute is reasonably related to the object sought to be achieved by the statute, the statute must be held not to violate the equal protection clause. If the means (aside from the classification) by which the object sought to be achieved violates some provision of the Constitution other than the equal protection clause, that is a different matter. In *Truax* v. *Raich, supra*, the statute involved was held unconstitutional because the means whereby its object was sought to be achieved was inconsistent with the exclusive federal power over immigra-

tion and its incidents and not because the classification had no reasonable justification. Before the adoption of the Twenty-First Amendment the statute now before us would have been held invalid because its lawful object would have sought to have been achieved by a means violating the implied prohibition of the commerce clause. But no provision of the Constitution can be pointed to which this statute now violates either in its object or the means whereby the object is sought to be achieved.

The problem may appear simpler if we suppose that the Missouri statute does not absolutely prohibit the importation of intoxicating liquors from discriminating states but puts up exactly the same barriers (*i. e.*, license fees for importation) against the importation of intoxicating liquors from those states which they have put up against intoxicating liquors imported from Missouri and other states. Would it be said that Missouri cannot impose a license fee on intoxicating liquors imported from California which imposes a license fee on intoxicating liquors imported from Missouri, unless Missouri also imposes a license fee on intoxicating liquors imported from Texas which does not impose a license fee on intoxicating liquors imported from Missouri? Would it be said that Missouri cannot impose a license tax on Iowa automobiles using Missouri roads and exempt Illinois automobiles from the same tax, solely because Iowa imposes and Illinois does not impose a license tax on Missouri automobiles using their respective highways. The Supreme Court has said, at least by way of clear dictum, that the last mentioned distinction is valid. *Kane* v. *New Jersey*, 242 U. S. 160, 167. The two cases are identical in principle. But if Missouri can put up a hurdle against California which it is not required to put up against Texas, it can erect also an impassable barrier (complete prohibition) against California while allowing free ingress to importations of intoxicating liquors from Texas.

3. Since the submission of this case a three judge court for the Eastern District of Michigan in a similar case has reached the same conclusion as that indicated in this opinion. *Indianapolis Brewing Co.* v. *The Liquor Control Commission*, — Supp. —.

Findings of Fact and Conclusions of Law.

We find the facts to be as stipulated by the parties and conclude as a matter of law that the bills should be dismissed.

The Attorney General will submit appropriate forms of decrees.

Filed Feb. 23, 1938. A. I. Arnold, Clerk, by E. O. Keefe, Deputy.

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